(5)

No. 91-545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL, TREASURER

and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL TAX COMMISSION, ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; KENNETH E. RYAN, TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/ACCOUNTANT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads ("AAR") respectfully requests leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for Respondents Blackfeet Tribe and Fort Peck Tribal Executive Board have withheld consent.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It has frequently filed *amicus curiae* briefs in cases before this Court that present issues of widespread importance to its members.*

The decision below will have a serious adverse effect on the railroad industry as a whole. In the case for which certiorari is sought, the Ninth Circuit upheld property taxes imposed by the Blackfeet and Assiniboine and Sioux Tribes ("Tribes") on the Burlington Northern Railroad's federally-granted rights-of-way through the Blackfeet and Fort Peck Indian Reservations. In upholding the challenged taxes, the Ninth Circuit rejected the railroad's argument, predicated on this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), that tribal authorities lacked authority to impose taxes on nonmembers in the absence of a "consensual relationship" between the tribe and the nonmember.

If the decision of the Ninth Circuit is not overturned, the railroad industry as a whole, and not just the specific railroad litigant before this Court, will be subjected to unlawful and extensive tribal taxation of federally-granted rights of way across Indian reservations. Many of the Nation's railroads cross reservation lands. The

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* *See Southern Pacific Transportation Co. v. Jose Hernandez*, No. 91-293 (filed September 18, 1991); *Transportes Aeros Mercantiles Pan Americanos, S.A. v. International Association of Machinists and Aerospace Workers, et al.*, No. 91-02 (filed August 30, 1991); *Norfolk and Western Railway Company v. Olen Roberson*, No. 90-1271 (filed April 19, 1991); *Burlington Northern R.R. v. Oklahoma Tax Com'n*, 481 U.S. 454 (1987); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980).

prospect of tribal taxation is of grave concern to the industry because railroads have no voice in tribal government and no ability to remove themselves from a reservation without Federal authorization. As the representative of the nation's railroads, AAR is in a position to convey their concern with this decision and to present industry-wide factual information which will assist the Court in understanding the broad implications of the decision below. For the foregoing reasons, AAR respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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November 1, 1991

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QUESTIONS PRESENTED

1. Whether, in the absence of express congressional authorization, Indian tribes lack the power to tax nonmembers with whom the tribes have no consensual relationship.

2. Whether Indian tribes lack the power to tax the rights-of-way of nonmembers engaged in interstate commerce, where the rights-of-way were granted by the federal government and any discontinuance of their use is subject to exclusive federal regulatory determination.

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") is a nonprofit trade association representing the Nation's major railroads. Its members account for approximately

85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern.

AAR seeks to participate here because Tribal taxation of railroad rights-of-way is a serious and growing problem for the railroad industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Ninth Circuit opens the door to a new, and highly burdensome, tier of taxes on the Nation's railroads. It permits tribal taxation of interstate carriers who have no voice in tribal government, on the basis of railroad rights-of-way that were granted, not by the tribes themselves, but by the Federal Government. This holding paves the way for the tribes to extract revenues from a captive industry that is precluded from removing itself from the reservation without Federal authorization.

At least 55 Indian reservations are crossed by one or more railroads pursuant to rights-of-way granted by the Federal Government. Federal rights-of-way across Indian reservations provided essential links for the creation and completion of this Nation's interstate rail system in the nineteenth and early twentieth centuries. Those rights-of-way generally establish the present configuration of the Nation's interstate rail network and remain of undiminished importance to the flow of interstate rail commerce to the present day.

For over a century, railroads provided interstate transportation across Indian reservations essentially unhindered by efforts of local Indian tribes to impose taxes. Commencing in the mid-1980's, however, tribal authorities seeking additional revenues have increasingly looked to the rights-of-way of interstate railroads located within the boundaries of their reservations (as well as to other interstate

utility property on the reservation). Railroad rights-of-way are viewed as attractive subjects of tribal taxation because they are extremely unlikely to be removed from the reservation (and would require prior Federal regulatory approval to do so), are of significant value, and provide a basis for taxation the incidence of which falls wholly on interstate railroads (and other "off-reservation" interests) rather than on local residents. As such, federally-granted railroad rights-of-way across reservation lands are "sitting ducks" for tribal taxation efforts in the absence of definitive legal constraints on tribal taxation authority over nonmembers.

In the case at bar, the Court of Appeals for the Ninth Circuit upheld, as against railroad challenge, the authority of the Blackfeet and Assiniboine and Sioux Tribes ("Tribes") to impose, respectively, "possessory interest" [1] and "utility property" [2] taxes on Burlington Northern Railroad's federally-granted rights-of-way through the Blackfeet and Fort Peck Indian reservations. The Ninth Circuit relied on general language in this Court's decisions in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), to conclude that Indian tribes retain broad authority " 'to tax the activities or property of non-Indians taking place or situated on Indian land in cases where the tribe has a significant interest in the subject matter.' " Pet. App. at 10a (quoting *Colville*, 447 U.S. at 153). The court found that the Tribes have a "significant interest" with respect to the challenged taxes "because Burlington's activities involve use of tribal lands and because Burlington is the recipient of tribal services." *Id.*

The Ninth Circuit summarily rejected the argument of Burlington Northern, squarely predicated on this Court's

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[1] Blackfeet Ord. 80 (1987).

[2] XVIII Ft. Peck Comp. Code §§ 301-324 (1987).

decision in *Montana v. United States,* 450 U.S. 544 (1981), that the inherent authority of the tribe did not generally extend to Burlington Northern as a nonmember, and that in the absence of a *consensual relationship* between Burlington Northern and the Tribes with respect to Burlington Northern's presence and activities on the reservation, the Tribes lacked the authority to impose taxes on Burlington Northern's rights-of-way. The lower court stated: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes, but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." Pet. App. at 11a.

The decision of the court below represents an improper construction of the scope of retained tribal authority with respect to taxation of non-Indians who have not entered into consensual relationships with the tribe. It ignores applicable precedent of this Court effectively incorporating a consensual relationship as a pre-condition of tribal taxation of non-members. Moreover, the decision below has the potential to inflict serious economic harm on the railroad industry. It emanates from the Circuit Court of Appeals with the most widespread jurisdiction over Indian affairs (including a majority of the Nation's Indian reservations) and provides judicial sanction for essentially unlimited tribal taxation of federally-granted railroad rights-of-way. Because the decision below raises important issues of Indian taxation authority over nonmembers—relevant not only to railroads but to other non-Indians lawfully on reservation lands—and because those issues can only be definitively resolved by this Court, this Court's review of the decision below is essential.

ARGUMENT

I. THE DECISION BELOW, IF ALLOWED TO STAND, WILL INFLICT SERIOUS ECONOMIC INJURY ON THE RAILROAD INDUSTRY

The Ninth Circuit's decision is likely to serve as the catalyst for massive tribal taxation of railroad rights-of-way. Railroads are the ideal target for such taxes—immovable, nonresident, interstate businesses. They have no voice in tribal government. In the absence of a "consensual relationship" requirement, there is *no* effective constraint that would prevent unlimited and discriminatory taxation of railroad rights-of-way by tribal authorities. As a result, railroads—whose rights-of-way are already taxed by state and local governments—are facing a new layer of taxes from tribal governments.

The problem has become increasingly grave since the issuance of the district court decision in this case. Information provided by just a few of AAR's Class I member rail carriers shows an alarming trend. Four of the largest carriers [3] are currently subject to taxation by Indian tribes. Taxes have been imposed on their rights-of-way by tribes all over the west, in Montana, North Dakota, New Mexico, Arizona, Nevada, and Idaho. Some railroads are taxed by more than one tribe in the same state. For example, the Atchison, Topeka and Santa Fe is taxed by seven tribes in one state (New Mexico). *See* app. at 1a.

The potential for additional tribal taxation is significant. The nation's rail carriers cross reservations of many tribes that have not yet imposed a tax. *See* app. at 1a-3a. Burlington Northern has over 100 miles of track in each of four reservations—Nez-Perce, Cherokee, Chickasaw and Creek—where it is not yet taxed.

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[3] The Atchison, Topeka and Santa Fe Railway Company (13 states); Burlington Northern Railroad Company (22 states); the Soo Line Railroad Company (9 states); and the Union Pacific Railroad Company (13 states).

For the most part, these are the roads' main lines; they cannot be abandoned.

Tribal taxes on possessory interests are disturbingly discriminatory. These taxes typically fall on railroads and other interstate utilities while exempting utilities that exclusively serve the reservation. It is not unusual for these taxes to exempt the tribes and other governmental entities as well. Nor is the tax inconsequential; it currently ranges from 2 to 7 percent of the value of the possessory interest. Finally, nearly half of these taxes were adopted in the past three years, since the issuance of the district court opinion upholding the taxes in this case. *See* app. at 4a-7a.[4]

Discriminatory taxation is not a new phenomenon for the railroad industry. Historically, state and local tax authorities often sought to obtain a disproportionate share of their tax revenues through excessive and discriminatory taxation of railroad property. As Congress noted in enacting the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), which sought to address this problem,[5] railroads "are easy prey" for state and local tax authorities because they are "nonvoting, often nonresident targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep.

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[4] The chart appearing at app. 4a-7a was compiled principally from material obtained through Freedom of Information Act requests to the various Area Offices of the Bureau of Indian Affairs. The listing is incomplete; no response was received from the Aberdeen, South Dakota, Area Office, and the Muskogee, Oklahoma, Area Office withheld the requested information claiming an exemption from disclosure. In addition, the requests were limited to tax ordinances and resolutions submitted for approval during the past five years.

[5] Section 306 of the 4-R Act, codified at 49 U.S.C. § 11503, requires state and local tax authorities to assess and tax railroad property at the same level generally applicable to other commercial and industrial property in the tax jurisdiction and to refrain from imposition of any other discriminatory tax on railroads. *See Burlington Northern Railroad v. Oklahoma Tax Commission*, 481 U.S. 454 (1987).

No. 630, 91st Cong., 1st Sess. 3 (1969). As Congress further found, the effects of discriminatory state and local taxation upon the railroad industry had been massive and persistent, and had operated to seriously weaken the National Transportation System.[6]

The exposure of railroads to excessive and discriminatory taxation is likely to be even more pronounced at the tribal level. Not only are railroad rights-of-way essentially stationary and defenseless targets for taxation efforts, but with respect to Indian tribes there appear to be no effective legal limitations on the arbitrary exercise of taxation authority. State and local governments, even in the absence of the 4-R Act limitations, are precluded from imposing taxes solely on non-voting, non-residents of the taxing jurisdiction by the requirements of the Equal Protection Clause of the Fourteenth Amendment, *see, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), and the non-discrimination requirements of the Interstate Commerce Clause, *see, e.g., American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). Tribal taxing authorities, however, are not similarly constrained by these constitutional limitations. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978); *Duro v. Reina*, 110 S. Ct. 2053, 2064 (1990); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).[7]

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[6] *See, e.g.*, S. Rep. No. 630, at 3-8. The Senate Report found that over the previous nine year period the railroad industry had been assessed more than $900 million in discriminatory state and local property taxes. *Id.* at 3.

[7] Moreover, Federal statutes impose no specific limitations or constraints on the scope of retained Indian tribal taxation authority in those circumstances where it may be exercised over nonmembers. Although the taxes in the instant case were submitted by the Tribes to the Secretary of the Interior, Bureau of Indian Affairs, for prior approval (Pet. App. at 18a, 40a), there is no general requirement that tribal officials seek prior Executive Department approval for specific tax provisions they may adopt applicable to non-members. As this Court held in *Kerr-McGee Corp. v. Navajo Tribe of In-*

In sum, railroads have always been tempting targets for excessive taxation by the jurisdictions through which they pass. With respect to state and local jurisdictions, however, these pressures have been held in check by various legal barriers. The Ninth Circuit's decision has *removed* the critical legal constraint on tribal taxation of railroads—the requirement that a tax be predicated on a consensual relationship. If that decision is allowed to stand, the tribes can be expected to look increasingly to the railroads whose interstate lines happen to cross their reservations as a convenient captive revenue source.

II. THE HOLDING OF THE COURT BELOW THAT INDIAN TRIBES HAVE AUTHORITY TO TAX NONMEMBERS IN THE ABSENCE OF A CONSENSUAL RELATIONSHIP IS CONTRARY TO DECISIONS OF THIS COURT

A. The Decision Below Misconstrues the Nature and Scope of Retained Sovereignty of Indian Tribes

The decision below is, at bottom, based upon a misconstruction of the scope of tribal sovereignty, as delineated by prior decisions of this Court. Reservation lands are delineated by treaty and Federal statute and are lands held in trust by the United States for the beneficial ownership of Indian tribes. Although physically within the United States and state and local geographical boundaries and subject to the ultimate sovereignty and con-

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dians, 471 U.S. 195 (1985), unless a tribe itself voluntarily consents to such a limitation, by adopting a constitution pursuant to the provisions of the Indian Reorganization Act of 1934, 48 Stat. 984, (codified at 25 U.S.C. §§ 461 *et. seq.*), or otherwise, there is no statutory requirement that a Tribe *must* seek prior Executive Department approval before it may adopt tax laws affecting nonmembers. In any event, even where BIA approval is sought, as occurred in the instant case, such review is generally perfunctory (the Fort Peck Tribes' "Utilities Tax" was approved the next day) and without objective standards.

trol of the Federal Government, Indian tribes generally retain by treaty the right to exclude nonmembers from reservation lands. In addition to other specific rights that may be granted by treaty or Federal statute, Indian tribes are also held to retain "inherent sovereignty" by way of tribal self-government to "control their own internal relations, and to preserve their own unique customs and social order." *Duro*, 110 S.Ct. at 2060; *accord Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989).

A tribe's authority with respect to control of its external relations, however, is limited. "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'" *Brendale*, 492 U.S. at 425-26; *accord United States v. Wheeler*, 435 U.S. 313, 325 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). As this Court has stressed, "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the Tribe." *Wheeler*, 435 U.S. at 326; *accord Duro*, 110 S. Ct. at 2060.[8]

B. The General Principles Established by This Court in *Montana* Require A "Consensual Relationship" Between the Tribe and Nonmembers Before a Tribe Can Tax or Exercise Other Civil Authority Over a Nonmember

General principles for determining the scope of a tribe's inherent authority in civil affairs over nonmembers on reservation lands were formulated by this Court in *Montana*. In *Montana*, the Court held that the tribe's inher-

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[8] Where authority to regulate conduct is not within a tribe's inherent or congressionally-delegated jurisdiction, Federal or state and local law (to the extent not preempted) apply to the reservation. State and local tax laws may apply to nonmembers of the tribe, but may not be applied to on-reservation activities of tribal members.

ent sovereignty did not support a prohibition on nonmember hunting and fishing on reservation lands to the extent it applied to fee lands owned by nonmembers (who were no longer subject to the tribe's power of exclusion). As held by this Court in *Montana*, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564.

The Court in *Montana* formulated a general test for determining inherent tribal authority over nonmembers. It found that as a "general proposition . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The *Montana* Court recognized only two exceptions to this general principle. These exceptions require either (1) a *consensual relationship* between a tribe and a nonmember through, e.g., commercial dealing, contracts, leases, or other arrangements before a tribe may regulate through taxation, licensing or other means the activities of the nonmember or (2) a threat to, or direct effect on, the political or economic security of the tribe arising from the conduct of the nonmember before the tribe's inherent sovereignty may be invoked. As formulated by the *Montana* Court:

> A tribe may regulate, through *taxation*, licensing, or other means, the activities of nonmembers who enter consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. (emphasis added).

The general principles enunciated in *Montana* form a vital part of the jurisprudence of this Court and were recently relied upon as the basis for the opinion of Justice White (joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) in announcing the judgment of this Court (by plurality decision) in *Brendale.* In *Brendale,* the Court considered whether zoning authority over the "open" (generally range and fee land) and "closed" (predominantly forest) portions of the Yakima National reservation was vested in Yakima County or in tribal authorities. In his opinion announcing the judgment of the Court with respect to the "open" areas, Justice White applied the *Montana* presumption against tribal authority over nonmembers and found that neither of the two *Montana* exceptions was applicable. With respect to the "consensual relationship" test, Justice White found it undisputed that nonmember property owners challenging tribal zoning authority "do not have a 'consensual relationship' with the tribe simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided." *Brendale,* 492 U.S. at 428. Justice White also found, based on the District Court's findings, that the County's exercise of zoning authority over the open areas would not imperil the protectible interests of the tribe. *Id.* at 432. Accordingly, in the absence of an express congressional delegation of power, tribal authority to zone the "open areas" of the reservation was held to be divested.

The *Brendale* Court reached a different result as to the "closed" areas—a result that turned on the tribe's power to exclude. Under Justice White's opinion, tribal zoning authority over both the "open" and "closed" areas would have been held divested based upon the *Montana* analysis (subject to the tribe's right to assert its protectible interests in Yakima County zoning proceedings). Justice Stevens (joined by Justice O'Connor) concurred in Justice White's opinion in *Brendale* only with respect to the "open" areas, finding that the tribe's right to ex-

clude survived in the closed areas and provided the tribe with the lesser included power to zone fee lands in the closed areas.[9]

The absence of a single majority view in *Brendale* leaves the law of Indian sovereignty in a somewhat uncertain state. But it is clear that, under any of the theories applied in *Brendale*, the Court below (which did not even cite *Brendale*) has overstepped the appropriate bounds. Neither of the *Montana* exceptions is present here, so that the general presumption against the assertion of sovereignty over nonmembers must be respected. And the Tribes have never had a power to exclude the railroads from their reservations, and therefore cannot predicate a power to tax on that authority.

C. This Court's Decisions Upholding Exercises of Tribal Taxation Authority Over Nonmembers Are Wholly Consistent With the "Consensual Relationship" Requirement Established by *Montana*

In its decision below, the Ninth Circuit rejected Burlington Northern's contention, directly predicated on *Montana*, that a "consensual relationship" must be demonstrated between Burlington Northern and the Tribes before tribal officials could be held to have authority to tax the railroad's property on its federally granted rights-of-way. Ignoring *Montana*, the Court below relied instead on general language in this Court's decisions in *Colville* and *Merrion* allegedly supporting its assertion that a "consensual relationship" with the Tribe was neither necessary nor relevant. Pet. App. at 11a. *Colville* and *Merrion*, however, both indisputedly involved a "consensual relationship" as contemplated by *Montana*.

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[9] The remaining three Justices, in an opinion by Justice Blackmun, while disagreeing with *Montana*'s allegedly "reversed presumption," did not attempt "to excise [*Montana*] from [the Court's] jurisprudence." *Id.* at 456. Instead, Justice Blackmun argued that the second *Montana* exception supported a finding of inherent tribal authority to zone fee lands in the reservation. *Id.* at 456-57.

In *Colville*, which pre-dated *Montana*, the question of tribal taxation of nonmembers arose indirectly. Tribal authorities challenged (on federal preemption grounds) the authority of Washington State to apply its cigarette sales tax to on-reservation cigarette sales by tribal smokeshops to nonmembers of the tribe. The tribes contended that tribal taxes imposed on smokeshop cigarette sales generated substantial revenues for the tribes and that, if the state were also found to have authority to tax these sales, the smokeshops would lose customers and the tribes would forfeit substantial revenues. *Colville*, 447 U.S. at 154-55.[10]

In response, the state challenged the authority of the tribes to tax on-reservation sales to non-members. The *Colville* Court (while upholding concurrent state taxation authority over on-reservation cigarette sales to nonmembers) rejected the state's argument that the tribes lacked authority to tax such sales. In the language quoted by the court below, the *Colville* Court found that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152.

Although the Court used broad language, *Colville* is at bottom wholly consistent with, and is essentially an example of, *Montana*'s "consensual relationship" requirement. Indeed, the existence of a "consensual relationship" in *Colville* is indisputable. Nonmembers of the tribe were granted consent by the tribe to enter onto reservation lands for the purpose and privilege of directly engaging in economic transactions with the tribe and tribal members (cigarette purchases). The tribe's tax was di-

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[10] In *Moe v. Salish & Kootenani Tribes*, 425 U.S. 463 (1976), this Court held that states could not tax on-reservation cigarette sales to tribal members because the tribes enjoyed federal preemption from state taxation as it applied to on-reservation activities of members of the tribe.

rected solely at the conduct which was the subject of the consensual relationship (cigarette sales). Moreover, each of the cases cited by the *Colville* court in support of tribal taxing authority also demonstrates a clear "consensual relationship" between a tribe and nonmembers. *See Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (nonmember lease of grazing rights); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (nonmember lease of tribal lands for grazing); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905), *appeal dismissed*, 203 U.S. 599 (1906) (tribal permission granted to nonmembers to engage in trade with tribal members on reservation lands). Indeed, if there could be any doubt on this issue, the *Montana* court itself specifically cited *Colville* as an example of a "consensual relationship" that could support tribal taxation authority over nonmembers. *Montana*, 450 U.S. at 565-66. *Colville* accordingly cannot be broadly read to obviate *Montana*'s "consensual relationship" requirement as the court below improperly attempted to do.

The court below also relied on *Merrion* for its assertion of tribal taxation authority over nonmembers notwithstanding the absence of a consensual relationship. Like *Colville*, *Merrion* does not establish this general proposition.

In *Merrion*, tribal authorities sought to impose a severance tax on oil and gas produced from reservation lands. Petitioners, who had entered into mineral leases with the tribe granting them permission to extract oil and gas in return for royalty payments, challenged the tribe's authority subsequently to impose severance taxes on their production. Essentially, petitioners argued that because the tribe could no longer exclude them from the reservation lands, the tribe could not tax their economic activities. The *Merrion* court, relying on language in *Colville*, rejected petitioners' assertion that tribal power to tax is based solely on the power to exclude. 455 U.S. at 137. The *Merrion* court further observed that the tribe's interest in levying taxes on nonmembers to raise

"revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." *Merrion*, 455 U.S. at 138 (quoting *Colville*, 447 U.S. at 156-157).

Merrion, like *Colville*, involved a consensual relationship between the tribe and a nonmember regarding economic activities engaged in on the reservation by the nonmember with the tribe (i.e., a mineral rights lease). Thus, the holding in *Merrion* does not vitiate the consensual relationship requirement imposed by this Court in *Montana*.

Moreover, not only is a "consensual relationship" present in both *Colville* and *Merrion*, such a relationship is present in *every* case of which *amicus* is aware in which tribal taxation authority over nonmembers has been challenged and upheld in this Court. *See, e.g.*, cases cited *supra* at p. 14. *See also Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The decision below thus stands on its own in holding, contrary to *Montana* and the factual circumstances present in every other tribal taxation case decided by this Court, that a consensual relationship is not required as a condition of tribal taxation authority over a nonmember. This basic question requires further examination by this Court.

III. THE RAILROADS' RIGHT OF PASSAGE OVER RESERVATION LANDS IS NEITHER DERIVED FROM NOR DEPENDENT UPON TRIBAL CONSENT

While holding that a "consensual relationship" was not necessary to the imposition of the tribal taxes, the Ninth Circuit nevertheless purported, in a footnote, to find such a relationship here. As stated by the Ninth Circuit, "[i]f a consensual relationship was necessary, the tribe consented to railroad rights-of-way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for

rights-of-way". Pet. App. at 11a n.7. These conclusions cannot withstand analysis.

Burlington Northern's rights-of-way through the Blackfeet and Fort Peck reservations were granted to the railroad's predecessor-in-interest directly by the Federal Government, not by tribal authorities. The rights-of-way are accordingly *federally-granted* rights, and not tribal rights of permission. The tribes were and are wholly without authority to withhold consent to federal rights-of-way grants through their reservations for railroad construction and other public purposes pursuant to applicable federal statutes. *See Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890). There is thus *no* consensual relationship between the tribes and the railroad in the instant case that could support the authority of the tribes to impose the taxes at issue as required by *Montana*.[11]

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[11] Nor were there any judicial findings in this case that could satisfy the second *Montana* exception, i.e., nonmember activity that would threaten or directly affect the vital interests of the Tribes. Neither the Ninth Circuit nor the District Court made specific factual findings regarding the second *Montana* exception. The Ninth Circuit's conclusory assertions that Burlington Northern's presence on tribal lands through use of its federally-granted rights-of-way could be subject to tax because Burlington Northern "receives the intangible benefits of a civilized society . . . and the tangible benefits of police and fire protection" (Pet. App. at 10a) does not even purport to address the otherwise stringent criteria of the "vital tribal interests" test as enunciated by this Court in *Montana* and *Brendale*. It is difficult to see how a railroad's long-standing use of its rights-of-way through reservation lands, without more, could be held to threaten vital tribal interests.

Indeed, the conclusory findings of the Court below would be broadly applicable to *any* incidental presence on, or use of, reservation lands by nonmembers, and would ignore this Court's observation in *Colville*, reasserted in *Merrion*, that a tribe's interest in levying taxes on nonmembers "is strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." There are no specific factual findings in this case on any of those issues.

Indeed, the overarching role of the Federal government with respect to railroad rights-of-way within the borders of Indian reservations makes tribal taxing power particularly inappropriate. Simply stated, it was the Federal government that initially selected the route for the rights-of-way, the Federal government that selected the recipients of the rights-of-way, and the Federal government that now determines whether service over those rights-of-way must be continued. In these circumstances, the Tribes have no sufficient attribute of sovereignty over federally granted rights-of-way from which a power to tax can flow.

For the most part, the railroads that operate lines through Indian reservations obtained their rights-of-way from the Federal government, as part of a national policy to encourage settlement of the American West. The statutes granting such rights-of-way did not give the railroads carte blanche to select the route their lines would transverse, so as to enable them to bypass the Indian reservations, nor was this typically made a matter for negotiation between the railroads and the tribes. Rather, the Federal government itself specified the route, the dimensions of the right-of-way, and other details of construction of the line.

The BN rights-of-way through the Blackfeet and Fort Peck reservations are a classic example of the way in which right-of-way grants typically occurred. In 1887 Congress granted to BN's predecessor a right-of-way through the Indian reservations in the northern Montana and northwestern Dakota Territories, which included the Fort Peck reservation. Act of February 25, 1887, ch. 130, 24 Stat. 402.[12] The Act set out the location and

[12] The Blackfeet and Fort Peck Indian reservations were established in the Act of May 1, 1888, ch. 213, 25 Stat. 113. That legislation ratified an agreement negotiated in 1886 and 1887 between the Tribes and the United States. Article VIII of the Agreement and implementing legislation granted to railroads (and others) rights-

dimensions of the right-of-way (*id.* §§ 2, 3) and provided that the railroad's rights would vest upon the approval by the Secretary of the Interior of maps showing the precise location of the road and related structures and the payment of the compensation set by the Secretary. *Id.* § 4. The construction and operation of the railroad were to be conducted "in accordance with such rules and regulations as the Secretary of the Interior may make . . . ." *Id.* The requisite plats were approved by the Secretary later that same year.

By 1890, BN's predecessor had completed construction of its railway through Montana to the boundary of the Blackfeet Reservation. Its application for a right-of-way through the Blackfeet Reservation was granted by President Harrison, and the Secretary of Interior determined that the dimensions of the right-of-way would be the same as those specified in the Fort Peck legislation. The survey maps were approved by the Secretary of Interior in 1893.

Thus the presence of BN's lines on the Fort Peck and Blackfeet reservations is a direct result of Federal specification, with no involvement by the Tribes. BN's rights-of-way "were taken out of the reservation by virtue of the grant" from the Federal Government (*Maricopa & Phoenix Railroad v. Arizona Territory*, 156 U.S. 347, 352 (1895)). As a result, the Tribes possess no sovereign power over those rights-of-way, and taxation by the Tribes should thus be precluded.

Equally important, having built their lines across reservations pursuant to Federal direction, railroads are now unable to abandon service over those lines—or even move a line to a route outside the reservation—without Federal authorization. Since 1920, the Interstate Commerce Act has prohibited a railroad from abandoning or

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of-way through the reservations, subject to a Presidential "public interest" determination.

discontinuing service over any line (whether constructed before or after enactment of the statute) unless the Interstate Commerce Commission first determines that public convenience and necessity so permit. 49 U.S.C. § 10903; *see Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 144-45 (1945). A similar public convenience and necessity finding is required as a prerequisite to the construction of a new line of railroad. 49 U.S.C. § 10901. Thus railroads are essentially "locked into" their operations across Indian reservations. Unlike most other businesses, who are free to pick up and remove themselves from the reservation if the economic burdens of tribal taxation outweigh the benefits of their continued presence, railroads are compelled by federal law to continue to operate across the reservations.

By the same token, the tribes are wholly precluded by federal law from excluding the railroads from their reservations, or forcing them to discontinue their operations. The power of the Interstate Commerce Commission over railroad abandonments and discontinuances is "exclusive and plenary." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320-21 (1981). The sole remedy of a tribe that wished to exclude a railroad from its reservation would be to file a petition with the Interstate Commerce Commission, asking that the Commission order the line abandoned. *See Thompson*, 328 U.S. at 145. And the Commission's determination would be based on the same "public convenience and necessity" standard prescribed by federal law for any other abandonment request.

In sum, the presence of the railroads on Indian reservations and the continued use of their rights-of-way are both governed by Federal law. Neither the railroads nor the tribes are free to terminate their relationship. Given the pervasive Federal involvement, tribal taxation of such rights-of-way is particularly inappropriate.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

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RESERVATIONS CROSSED BY SELECTED RAILROADS

CARRIER	STATE RESERVATION	TAXED
Atchison, Topeka & Santa Fe	Arizona	
	Navajo	Proposed
	Hualapai	Yes
	Colorado River	No
	California	
	Colorado River	No
	New Mexico	
	Acoma	Yes
	Isleta	Yes
	Laguna	Yes
	Navajo	Proposed
	Sandia	Yes
	San Felipe	Yes
	Santa Anna	Yes
	Santo Domingo	Yes
Burlington Northern	Idaho	
	Nez-Perce	No
	Minnesota	
	Chippewas	No
	Montana	
	Ft. Peck	Yes
	Blackfeet	Yes
	Flathead	No
	Crow	Proposed
	Nebraska	
	Winnebago	No
	North Dakota	
	Ft. Totten	No
	Oklahoma	
	Cherokee	No
	Chickasaw	No
	Creek	No
	Iowa	No
	Kickapoo	No
	Kiowa	No
	Otoe	No
	Pawnee	No
	Peoria	No

RESERVATIONS CROSSED
BY SELECTED RAILROADS—Continued

CARRIER	STATE RESERVATION	TAXED
Burlington Northern	Oklahoma	
	Quapaw	No
	Sac & Fox	No
	Seminole	No
	Shawnee	No
	Wyandotte	No
	South Dakota	
	Standing Rock	No
	Washington	
	Yakima	No
	Colville	No
	Puyallup	No
	Wyoming	
	Shoshone	No
Soo Line	Minnesota	
	Prairie Island	No
	White Earth	No
	North Dakota	
	Ft. Berthold	Yes
	Wisconsin	
	Lac Courte Oueilles	No
Southern Pacific	Arizona	
	Gila River	No
	California	
	Yuma River	No
	Nevada	
	Pyramid River	No
	Walker River	No
Union Pacific	Idaho	
	Fort Hall	Yes
	Coeur d'Alene	No
	Nevada	
	Pyramid Lake	Yes
	Oregon	
	Umatilla	No
	Washington	
	Yakima	No

RESERVATIONS CROSSED
BY SELECTED RAILROADS—Continued

CARRIER	STATE RESERVATION	TAXED
Wisconsin Central	Wisconsin	
	Stockbridge	No
	Menomanee	No
	Bad River	No

REPRESENTATIVE TRIBAL TAXES APPLICABLE TO RAILROADS

STATE RESERVATION	TAX	RATE	EXEMPTIONS
Arizona			
Hualapai	Ord. No. 26 Possessory Interest Tax (1989)	7% full cash value (§ 4)	• Utility service lines, distribution and delivery facilities • Governmental entities • Retail businesses • Ranches and homesites (§ 12)
Idaho			
Ft. Hall	Shoshone-Bannock Tribal Tax Code §§ 701-723 (1991)	3% assessed value (§ 705)	• Utilities exclusively serving the reservation (§ 714)
Montana			
Blackfeet	Ord. No. 80 Possessory Interest Tax (1987)	4% market value (§ 4)	• Utilities exclusively serving the reservation • Governmental entities • Residential property • Commercial establishments (§ 11)
Crow	Proposed Utility Tax	4% on utility property (§ 1-5)	• Tribe and its instrumentalities • United States and its instrumentalities

			• Utilities whose property on trust land is valued at less than $200,000 (§ 1-8)
Fort Peck	XVIII Ft. Peck Comp. Code chap. 3, Utilities Tax (1987)	3% of value (§ 303)	• Tribes and their instrumentalities • United states and its instrumentalities • Utilities whose on-reservation property is valued at less than $200,000 (§ 306)
Nevada			
Pyramid Lake	Ord. No. XXI, Tax Code ch. 205, Easement Tax (1990)	2% of annual assessed value (§ 205.003)	• Tribal members • Persons exempt under Nevada law • Credit for taxes on same property paid to state (§§ 220, 221)
New Mexico			
Cochiti	Ord. No. 011-1987, Possessory Interest Tax (submitted 1/25/88)	6% of fair market value (§§ 3, 4)	• Utilities exclusively serving the tribe or its members • Residential leases (§ 10)
Isleta	Ord. 86-55 *Ad Valorem* Possessory Interest Tax (as amended 1987)	5% *ad valorem* (§ 3)	• Utilities exclusively serving the reservation • Commercial business leases and permits (§ 10)

REPRESENTATIVE TRIBAL TAXES APPLICABLE TO RAILROADS—Continued

STATE RESERVATION	TAX	RATE	EXEMPTIONS
New Mexico			
Laguna	Ord. No. 400-86 Possessory Interest Tax (1986)	5% of fair market value (§§ 3, 4)	• Utilities exclusively serving the reservation • Commercial business leases (§ 10)
Santa Clara	Res. No. 13-90 Tax Ordinance (1990)	5% *ad valorem* (§§ 2.01, 2.05)	• Utilities exclusively serving the reservation (§ 2.07)
Santo Domingo	Res. No. SD-4-89-02 II Laws of the Pueblo of Santo Domingo (1987)	4% taxable value (§ 404)	• Interests held by United States, New Mexico • First $50,000 of taxable value • Interest held or used exclusively for agricultural purposes • $25,000 x number of tribal members employed on Pueblo land (§ 407)
Taos	II Laws of Pueblo of Taos (1989)	4% assessed value (§§ 302, 304)	• Interests held by tribal or other governmental entities and not used for business purpose • First $50,000 of assessed value • Interests held for agricultural purposes

			• Tribal members' land assignments not used for business purpose • Deduction of $20,000 x number of Pueblo members employed on tribal lands (§§ 307, 308)
Zia	Pueblo of Zia Tax Ord. (submitted 3/28/88)	5% assessed value (§ 2.05)	• Utilities exclusively serving the Pueblo or its members (§ 2.07)
North Dakota			
Ft. Berthold	Tribal Tax Code §§ 701-722 (1990)	3.5% assessed value (§ 705)	[Information not available]